IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.354 OF 2000

Dnyaneshwar Malhari Payal,
Convict Prisoner No.11099,
Yerawada Central Prison,
Pune-411 006. .... Appellant

- Versus -

The State of Maharashtra .... Respondent

Shri Jayesh B. Kocheta, Advocate, for the Appellant/Accused.

Ms Usha Kejriwal, Addl. Public Prosecutor for the Respondent-State.

CORAM: N.V. DABHOLKAR &
Smt.V.K. TAHILRAMANI, JJ.

DATED: JANUARY 23 & 24, 2006

ORAL JUDGMENT (Per N.V.Dabholkar, J.):

1. This appeal against conviction is directed against the Judgment and Order dated 13-1-2000 delivered by Xth Additional Sessions Judge, Pune. At the conclusion of Sessions Case No.453 of 1998, the learned Sessions Judge found the appellant to be guilty for offences punishable under Sections 302, 498-A and 354 of the Indian Penal Code. Consequently, he is sentenced to suffer RI for life, RI for three years and RI for two years on respective counts. Fine is also imposed on each count, followed by default sentences.

2. According to prosecution story, deceased Nirmala was wife of the accused Dnyaneshwar. The incident in question took place on 31-8-1998, at about 9:00 p.m. It is said that while the deceased with two daughters were about to commence their dinner, the appellant/accused arrived on the scene. He sat by the side of his daughter PW-1 Mangal. It is alleged that he outraged the modesty of the girl, aged about 15 years by that time, by pressing her breast and by inviting her to sleep with him. PW-1 Mangal refused to do so and she also started crying. Thereupon the accused started dragging her. Victim Nirmala being the mother of Mangal tried to intervene. This shifted the anger of the accused towards Nirmala. he pushed Nirmala towards the wall, picked up kerosene lamp, prepared of glass bottle (chimney). After pouring kerosene from the bottle container of the lamp upon the person of Nirmala, the accused also ignited her by using a match-stick. After setting her saree on fire, the accused escaped. Nirmala and Mangal raised shouts, hearing which neighbours Mandabai and Parubai rushed to the place of the deceased. The daughter Mangal and the two neighbours together extinguished the fire. Inspite of that Nirmala suffered burn injuries to her chest, abdomen, hands etc.

It appears that the victim proceeded to local rural hospital only on the next morning. Her statement

was recorded by PW-6 Sakharam Damase (Police Head Constable) which was treated as first information report (FIR). While she was in the hospital, dying declaration was also recorded by Special Executive Officer/Magistrate (PW-5 Vijay Bankar). While she was in the hospital, she was treated by Dr. Pradeep Joshi (PW-9). PW-8 Shri Balasaheb Bankar, API attached to Narayangaon police station, has carried out the investigation and after filing the charge-sheet and committal of the case, the trial ended in conviction, as above.

3. Apart from the daughter of the deceased and victim of the incident in her own right (PW-1 Mangal), Special Executive Magistrate Vijay Bankar (PW-5), PHC Damase (PW-6) who recorded the FIR, Dr. Joshi, Medical Officer (PW-9) attached to local rural hospital and the investigating officer, the prosecution has examined four more witnesses. Dr. Sadashiv Dantale (PW-7) had carried out the post-mortem of the dead body of Nirmala. Nirmala is said to have expired on 13-9-1998. After the post-mortem Dr. Dantale has opined that death was result of shock due to cardio-respiratory failure, suffered because of burns with septicemia. PW-2 Mahadeo Alhat and PW-3 Anil Sarwan are panch witnesses to the panchnama of seizure of clothes of the accused and both of them have turned hostile. PW-4 Manda is neighbour of

the deceased and hearing shouts of the victim she had reached the location, immediately after the incident.

4. During his statement under Section 313 of the Code of Criminal Procedure, 1973, the accused denies love marriage with deceased Nirmala. He admits that he is married to Chandrakala and yet he was intermittently residing with deceased Nirmala since last 3-4 years. The accused has admitted his presence at the place of the victim not only at the time of the alleged incident, but he has claimed that he was at her residence since morning. He has also admitted arrival of neighbours Mandabai and Parubai on the scene, but according to him, it was only after Nirmala was extinguished. It is the claim of the accused that he himself extinguished deceased Nirmala and during the process he suffered burn injuries. According to him, he had paid some money to Nirmala in the morning at her request. She again demanded more money in the evening and hence there was a quarrel between the two. He angrily left the house. Soon after he heard shouting from the house and hence he returned to see that Nirmala was on fire. He extinguished the fire and in the process suffered some burn injuries.

5. For the reasons discussed in paragraphs 12 to 19, the learned trial Judge was convinced that PW-1 Mangal

was a reliable witness and the cross-examination instead of shattering her credibility has helped bring on record some more details. According to the learned trial Judge, the dying declaration of the victim, as recorded by PHC Damase and which is treated as the FIR (Exhibit-24), as also her statement (Exhibit-22) recorded by PW-5 Vijay provides corroboration to the evidence of Mangal that is required. The merits of the two dying declarations are considered by the learned Judge in his Judgment in paragraphs 20 to 25 and 26 to 29. History as recorded by Dr. Joshi and certification of fitness of the patient by Dr. Joshi when the dying declaration was recorded by PW-5 Vijay, so also the spot panchnama Exhibit-17, according to the learned trial Judge; further strengthens the prosecution case.

Although the trial Court has discussed the evidence of PW-7 Dr. Sadashiv, the autopsy surgeon in para 32 and arrived at the conclusion that death of Nirmala was caused by burn injuries, no such discussion was in fact necessary. This is because the deceased having suffered burn injuries is admitted fact and as can be seen from the record that the opinion rendered by Dr. Dantale is not at all challenged by the defence. Exhibit-25 shows that the defence counsel declined to cross-examine the autopsy surgeon.

From paragraph 35 onwards, the learned trial Judge has considered the challenges raised by the defence and having repelled all the points raised by the defence, the learned Judge arrived at the conclusion that none of the grounds raised by the defence were sufficient to destroy the core of the prosecution case. Having believed the prosecution story, the appellant is held guilty of committing murder of Nirmala. He is also held guilty for outraging the modesty of PW-1 Mangal and so far as offence under Section 498-A of IPC is concerned, the learned trial Judge has observed thus:

> "As regards the offence Under/Sec.498-A I.P.C. when the accused was subjecting his own daughter or the daughter of his wife Nirmala to the lustful behaviour since the time she attained menarche and on account of that the quarrel took place between the accused and Nirmala in which Nirmala ultimately was put to death, this evidence is more than sufficient to prove the charge under Section 498-A I.P.C."

6. Heard Advocate Shri Jayesh Kocheta for the appellant/accused and Ms Usha Kejriwal, A.P.P. for the respondent-State. Instead of enlisting the submissions

of the two counsels, we intend to deal those, during the course of discussion by reasons. It may be said, in brief, that Advocate Shri Kocheta had assailed both the dying declarations and deposition of PW-1 Mangal as untruthful. He pointed out that there is unexplained delay in recording the FIR and there is also no explanation to the burn injuries suffered by the accused. According to him, therefore, the accused has probabalised his defence that there was an attempt to commit suicide on the part of Nirmala and he extinguished the fire. As an alternative submission, he has also submitted that taking into consideration the nature of the burns to be superficial and the fact that the deceased expired after considerable lapse of time since the alleged incident, the offence would fall within the purview of Section 304 Part-II and not within the ambit of Section 302 of IPC.

7. We wish to begin with the charge under Section 498-A of IPC and the learned A.P.P. fairly conceded that the said charge may not be sustainable. We feel that offence under Section 498-A of IPC is not made out by the prosecution for multiple number of reasons.

Although accused admitted that he was maintaining relation with deceased Nirmala and he also admitted that he had performed love marriage at the

temple of Goddess with Nirmala, the prosecution does not dispute that Chandrakala is the first wife of the deceased. Thus, Nirmala being the second wife, in any case, cannot be said to be "wife" as contemplated by law.

While recording the finding that offence under Section 498-A of IPC is established, the learned Judge has lost sight of the definition of "cruelty" which is available under the said provision. The definition is provided in the explanation to Section 498-A. The conduct on the part of the husband or his relatives which psychologically drives the wife to commit suicide, is the first category. Ill-treatment or harassment of the wife by the husband or relatives of the husband, aimed at pressurising her to satisfy illegal demands, is another. In the matter at hand, the prosecution has not come with a case that Nirmala committed suicide or attempted to commit suicide, because of lust shown by the accused towards the daughter Mangal. It is not the prosecution case that there were demands by the accused to be satisfied by the deceased or her relatives and that there was persistent ill-treatment to Nirmala for pressing those demands. We are of the considered view that the basic ingredients of the definition of "cruelty" as contained in the explanation to Section 498-A of IPC are missing from the prosecution story,

even if the same is accepted on its face value. Whether Nirmala can claim to be "wife" of the accused, during the life time of his legally wedded wife Chandrakala (admittedly Chandrakala was married to the accused before his love marriage with Nirmala) was another issue to which the learned trial Judge failed to address.

8. We must say that charge under Section 498-A is not sustainable and the appeal to the extent it challenges conviction under the said provision will have to be allowed.

9. So far as dying declaration Exhibit 22, as recorded by PW-5 Vijay Bankar, is concerned, even without reference to the contents of the dying declaration, learned counsel appearing for the appellant desired us to disbelieve the same. According to him, the deposition of the witness goes to suggest that he must not have recorded the same but he is deposing to the prepared dying declaration. For that purpose he relied upon two bold points from his deposition. The witness commenced his deposition by saying that he is Special Executive Magistrate whereas in the dying declaration he has repeatedly referred to himself as Special Executive Magistrate. During the course of his cross-examination, PW-5 Vijay ultimately admitted that he is wrongly referred as Special Executive Magistrate in the dying

declaration Exhibit-22 on all locations wherever the reference, although in fact he is Special Executive Officer. It is unfortunate that Vijay Bankar is not merely an agriculturist but he is a graduate in agriculture and yet he is a person confused about his designation but we were unwilling to give much importance to this confusion for obvious reason, that Section 32 of the Indian Evidence Act, 1872 does not require recording of dying declaration by any particular person nor it prescribes any particular rank required to be held by the person who records the dying declaration.

The dying declaration Exhibit-22 otherwise suffers from no infirmities regarding procedure. Shri Bankar has said that he enquired with the doctor about the patient whose dying declaration was to be recorded. He himself had satisfied by questioning the victim that she was in a position to make a statement, he reduced the statement to writing in his own hand-writing. It was read-over and explained to the victim and then her thumb impression was obtained. According to him, the doctor was present throughout while he was recording the statement. The doctor has made two endorsements on the dying declaration.

His evidence is supported by PW-9 Dr. Joshi. According to Dr. Joshi, Nirmala had come to the Primary

Health Centre on 1-9-1998 in the morning and she had suffered 53.5% superficial to deep burns. According to Dr. Joshi, she gave history that her husband had poured kerosene on her (impliedly suggesting that she was set on fire by her husband). According to Dr. Joshi, the Special Executive Magistrate recorded the dying declaration of the injured and it was only after he examined the patient and declared her fit to make a statement. When we refer to Exhibit-22, same bears two endorsements by Dr. Joshi - one at the top and one at the bottom of the statement.

Advocate Shri Jayesh Kocheta has pointed out from the deposition of PW-5 Vijay that Vijay is unaware regarding the time of recording of this dying declaration. From the endorsement by the Medical Officer it can be seen that the recording was commenced at 9:45 a.m. and it was concluded at 10:05 a.m. Even within the body of the dying declaration, the time of recording is stated as 09:45 hours. As against this, PW-5 states

> "I was in my field at Warulwadi, when police came to call me. Police had come to call me at 12 O'clock at noon. Immediately during 3-4 minutes I went with police. I went on motorbike of the

> police. There is distance of about 5 minutes on motorcycle between my field and rural hospital."

Advocate Shri Kocheta was justified in arguing that if this time schedule given by PW-5 is taken into consideration, the witness could not have reached the hospital before about 12:20 and in that case the recording of the dying declaration could not have commenced before 12:30. Shri Kocheta was very critical about this error on the part of the Special Executive Officer/Magistrate because the witness is highly educated, he is a graduate in agriculture and, therefore, capable of making a distinction between morning hours and noon hours.

10. So far as Exhibit-20 is concerned, same was recorded by PW-6 Sakharam Damase, Police Head Constable then attached to Narayangaon police station. On receipt of intimation from Civil Hospital that a patient named Nirmala was admitted, he proceeded for recording the statement, as ordered by PSI Bankar. According to him, he reached the hospital at about 9:00 or 9:30 a.m.. He enquired with the patient Nirmala, recorded her statement and as can be seen from the record, the said statement Exhibit-24 was treated as the first information report and C.R.No.96/98 was registered on

the basis of the same at 09:20 hours. Thus it can be seen that statement Exhibit-24 was recorded some time prior to 09:20 hours. The Police Head Constable Damase has not recorded timings as to when he commenced the recording of the dying declaration and when he concluded it. He has also not obtained any endorsement regarding fitness of the patient to make a statement; nor Dr. Joshi has deposed anything about recording of this statement of victim, presumably because he was not present when the same was recorded.

24th January, 2006

Thus, about dying declaration recorded by Head Constable Damase (PW-6), two defects in its recording are pointed out that, there was no consultation with the doctor in order to ascertain fitness of the patient Nirmala to make a statement. The timings of commencement and conclusion of the said dying declaration, are required to be ascertained from the fact that the crime was registered at 09.20 hours and there is no explanation for these two defects, although Head Constable Damase is examined. So far as dying declaration (Exhibit-22), as recorded by Vijay Bankar, Special Executive Officer/Magistrate (PW-5), is concerned, an error committed by the witness, regarding timing of recording the same, is unexplainable,

especially when, he is an educated witness. On reference to Exhibit-22 - the original document -, we find that, within the body of dying declaration, the date and time of recording (1-9-1998 at 09:45 hours), writing of time has come by overwriting. The digits '9' and '4' are overwritten upon earlier writing, which now is not legible. Similarly, time 10:05, below second endorsement of the Medical officer, also has a overwriting at digit '0' in the time '10'. This mess of timings between the depositions and the document, has compelled us to consider this dying declaration with closer scrutiny. We must add that, the endorsements of the Medical Officer at Exhibit-22, are not so positioned that the deposition of Dr. Joshi can be accepted about his having made first endorsement before commencement of recording of dying declaration and second, after the conclusion. Both the endorsements are in the left margin i.e. the left top corner and left bottom corner. Ordinarily, if the first endorsement was made by the Medical Officer before commencement of the dying declaration, there is no reason why such an endorsement should not have been horizontal and at the top of the page, in stead of being in the left margin corner. The second endorsement can be explained by hypothesis that, the doctor endorsed it in a cramped space, so as to keep it on the side of the page, where the dying declaration is recorded. (It is recorded on one side and there are

no contents on the back side of the page). But there is no such explanation available to the first endorsement, if that was done before commencement of the dying declaration. After conclusion of dying declaration, there is a space wherein about 3 to 4 lines could have been written and this space is now utilised by the learned Sessions Judge to put his endorsement, regarding sessions case number, exhibition and admission of the document, in evidence. After the space, the dying declaration is concluded by the acknowledgment of the maker of the statement, to the effect, that the same is recorded correctly as narrated by the maker. It must be said that this space between the dying declaration and acknowledgment gives an impression of possibility of thumb impression having first obtained at the right bottom of the page and the gap is left, in order to absorb the excess space, that would have otherwise appeared between the thumb impression of the maker and the conclusion of the dying declaration. The overwriting on the timings, the manner of endorsement by the Medical Officer and the space between the dying declaration and acknowledgment of correctness by the maker, gave rise to further suspicion about Exhibit-22, in addition to one that was created by couple of confusions deposed to by PW-5 Vijay.

Although with naked eye, we have compared this

dying declaration with the FIR (Exhibit-24), as recorded by Head Constable Damase. No doubt, we are taking a bold decision to compare the handwriting by naked eye, but on comparison of Exhibit-22 with Exhibit-24, we find that there is ample assistance within the documents to enable us to say that those are written in the handwriting of the same person, in all probability, in the handwriting of Head Constable Damase, which would falsify the claim of the Special Executive Officer/Magistrate that, Exhibit-22 is in his own handwriting and this would also explain the confusion of Vijay (PW-5) being Special Executive Officer, but being referred as Special Executive Magistrate, in Exhibit-22. On reference to major portion, which is a dying declaration, commencing with the words "_____", which is in response to last question as to how she suffered burns, penultimate paragraphs of Exhibit-24, also commencing with the words "_____", and also to some contents in the earlier paragraph, regarding description of location of injuries, it can safely be said that the contents are borrowed from Exhibit-24 and that is why, major sentences are identical in both the documents, except with very minor variances. By comparing the words appearing in the two documents e.g., "------- ", "--------- " and "------- ", which words we have underlined in both the documents in blue ink, we have

confirmed that the style of writing these words is very much identical, which is evident from double "------ " (Matra) overhead-strokes in the words "-------- " and "--------" (Velanti) overhead inverted curve in the remaining two words, ending on the next letter.

We have also underlined another couplet in both the documents in red ink. Those demonstrate, not only identical style of writing, but even identical chronology of describing the injuries. The word "------- " and "--------- " appearing in this red underlined part, indicate identical style of "--------" (U-kar) by linking the same to the main alphabet. In fact, every time, "--------" (velanti) on the first alphabet, ends on the next, and writing "---------" (U-kar), by linking to the alphabet, can provide confirmation of the writings being by one and the same person. Needless to say that, the shape and size of the letters, space between two lines, the style of leaving accurate margin, but otherwise occupying the complete page, also provide further support. We have no hesitation to record a bold finding that Exhibit-22 is in the handwriting of the same person, who has recorded Exhibit-24 and naturally, deposition of PW-5 Vijay that, Exhibit-22 is in his handwriting, shall stand falsified. This would explain confusion why in all the writings, designation of Vijay is recorded as Special Executive

Magistrate, although his designation is Special Executive Officer, as can be seen from his seal in the left bottom corners of the documents. Viewed from this angle, the reasons recorded by learned Trial Judge in paragraphs 38 and 39 of the judgments, to reject the challenge to Exhibit-22, appear to be inadequate.

The Judgment in the matter of **Laxmi (Smt.) v. Om Prakash,** reported in (2001) 6 SCC 118, relied upon by learned Counsel for the appellant, may now usefully be referred to. In paragraph 30 of the judgment, the Hon'ble Apex Court has recorded thus

> "A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by an investigating officer has been discouraged and this Court has urged the investigating officers to avail the services of a Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating

> officer or the police officer, later on relied on as dying declaration. In Munnu Raja v. State of M.P. this Court observed : (SCC p.108, para 11)
>
> "Investigating officers are naturally interested in the success of the investigation and the practice of the investigating officer himself recording a dying declaration during the course of an investigation ought not to be encouraged."

In the matter at hands, initially, we were not inclined to give much importance to the recording of Exhibit-24 by Head Constable Damase. This is because, Exhibit-24 itself is a FIR and it was not recorded after Damase could assume role of investigating officer.

Secondly, because Damase had taken precaution to get the dying declaration recorded by an agency other than the Investigating agency (Special Executive Officer, PW-5 Vijay), but in the light of state of affairs of the two dying declarations as discussed hereinabove, we are inclined to accept the submission of learned Counsel. We find no hesitation to record that Head Constable Damase seems to have taken over

enthusiastic interest in the matter.

In this matter, in fact, certificate regarding fitness of mental state to make statement, was not necessary, since there could be no doubt about the same, in view of the fact that victim Nirmala had overstayed at home, nearly for ten hours after the incident at 9:00 p.m. on 31-8-1998 and has reached the hospital only on 1-9-1998, in the morning. No doubt, prosecution has also relied upon dying declaration of Nirmala, as made to the Medical Officer Dr. Joshi, in the form of history of the incident. The fact, however, remains that the same has also come after 10 to 12 hours from the incident, which aspect we shall deal with little later.

11. The learned trial Judge in paragraphs 12 to 19 of the impugned Judgment has described the entire evidence rendered by PW-1 Mangal, eye-witness-cum-victim. These paragraphs describe the chief-examination as well as the cross-examination. In paragraph 15, the learned trial Judge has recorded that nothing adverse is elicited from the cross-examination of Mangal. In fact, in paragraph 16, the learned Judge has gone on record to say that, additional material has come on record (as if favourable to the prosecution) during her cross-examination. The learned trial Judge has not realised that this

additional material has sown the seeds of unreliability in the deposition of Mangal, by the defence counsel, by using "long rope" during the cross-examination. In order to substantiate our observations, we intend to refer to paragraph 8 of the deposition of Mangal which is part and parcel of her cross-examination. In this paragraph, Mangal states that when the accused started misbehaving with her, she shouted but neighbours did not come to rescue. She also tried to run away but was held by the father (accused). According to her, when the father gripped her, she did not shout for help. She claims to have shouted for help when the father started beating her mother and the beating is narrated thus "My father has (had) held my hands and assaulted my mother with kicks". This seems to be improbable. She admits she did not feel like running away when the father was trying to set the mother on fire, but she was shouting while her father was pouring kerosene on the person of the mother. She also adds that by the time other persons came there, her father was setting her mother on fire.

If we consider these additional details which have occurred in the cross-examination of Mangal, we can make out that she is telling improbable things and probably is trying to make out a story. If she had shouted for help and tried to run away, it cannot be

believed that she would keep quiet after being caught by the father. Action of gripping her and simultaneously kicking the mother also does not appear to be natural and possible. On reference to deposition of Mandabai, it is not her claim that she had arrived on the scene by the time the accused was trying to set Nirmala on fire (in fact, when we refer to the FIR Exhibit-24, it appears that Parubai and Mandabai are said to have arrived before the departure of the accused and the accused is said to have departed only after Mangal and the two neighbours extinguished the fire). We need to refer to chief-examination of Mangal in the light of this additional material. According to the chief-examination, when the father started misbehaving with her, the mother intervened and fury of the father therefore was transferred towards the mother. He beat the mother and ultimately set her on fire. It can be seen that having given an opportunity, Mangal has shown desire to improve the story. In chief-examination para 2, she says that father ran away from the house, no sooner mother caught fire. She has referred to arrival of Mandabai and Parubai, earlier than that. Thus, according to the FIR as well as the deposition of Mangal, the neighbours had arrived while the accused was still present. When we refer to the deposition of Mandabai, the story is different. Mandabai claims to have reached the location only when Nirmala was

extinguished. She had seen Nirmala with burn injuries but she does not claim to have seen the accused present, either in his action to set fire to Nirmala or in his attempt to run away.

Mangal claims that she has not studied in school, yet she narrates that her mother expired in the hospital on 13-9-1998. A person totally uneducated would ordinarily not depose Gregorian date but may prefer to say that victim died after some days from the day of the incident. Against the claim in chief-examination, that mother expired in the hospital, in the cross-examination para 8, Mangal says that mother had returned from the hospital after 5-6 days and thereafter she was not admitted in the hospital. This was inspite of the fact that doctor had advised to take her to Sassoon Hospital at Pune. In the chief-examination, version of Mangal is different. She has said that on the next day mother was taken to Sassoon Hospital. In fact, when did Nirmala return home from the hospital; whether she died at the hospital or at the residence; if she expired at the residence, whether she was properly discharged or she left the hospital against medical advise by returning home instead of going to Sassoon Hospital, are the questions which do not stand answered by the record. Version of Mandabai that she had met Nirmala after Nirmala returned

from the hospital, lends support to similar version of Mangal and, therefore, we are required to infer that probably Nirmala returned home against medical advise, instead of going to Sassoon Hospital and she expired at her residence.

The above instances touching the occurrence and hospitalisation of Nirmala are not the only instances which create doubts about the veracity of Mangal. Mangal as well as the dying declaration have tried to claim that Mangal is the daughter of Nirmala from the accused. Mangal has deposed that she knows the accused since the age of understanding. In fact, in her deposition para 4, Mangal had started answering all the questions regarding marriage of her mother with the accused but by the conclusion of para she regained composure and said that she does not know anything about the marriage because it took place before her birth. In this context, a reference to evidence of Manda is necessary. Manda is a neighbour and has no animus against either party. Her deposition, although cryptic and did not support the prosecution story, about her having arrived before the departure of the accused, she is not declared hostile. Manda has said that she knew Nirmala since last 18-19 years but she knows the accused only for last 4-5 years. If the marriage with the accused had taken place 15-16 years ago, neighbour Manda

ought to have been aware of it since she knows Nirmala for 18-19 years. Manda would have also known about the birth of Mangal after the said marriage. The prosecution has not dared to obtain such details from Manda. The details available to it are obtained by the defence during her cross-examination. The trial Court has failed to address itself to all the above aspects of the evidence of Mangal. On the contrary, on bare words of Mangal, it has presumed her to be the daughter born from the accused. Referring to the evidence of Manda and more particularly the admission regarding the period of acquaintance as a stray admission, the trial Court has failed to discover the adverse effects of those, otherwise innocent admission.

We feel that we have demonstrated enough material to justify our decision to be cautious before accepting the evidence of Mangal. Mangal claiming to be the real daughter of the accused is probably the most adventurous part of her deposition. It cannot be ignored that a major person keeping an evil eye on a girl of the age of his daughter would loose sympathy of everyone. But a person keeping an evil eye on his own daughter would not only loose sympathy but would invite hatred.

12. Because of depositions of Mangal and PW-6 PHC

Damase, although we are certain that the prosecution owes an explanation, we are not certain whether the explanation is required for the delay in lodging the FIR or the same is for suppression of the FIR. As already pointed out earlier, in her chief-examination, Mangal claims that on the next day the mother was taken to Sassoon Hospital and she expired in the hospital on 13-9-1998. In her cross-examination para 8, she deposes thus:

> "On the same night, we went to the police stn. I myself, my mother and the ladies residing nearby went to the police stn. at about 9.30 p.m. Police told us to go to the hospital. Police did not take my mother to the hospital, on that night. Police recorded the statement of my mother, only. We were in police station for about 10 mins."

Amongst the incidents of conflicting depositions of Mangal, in the latter part of the same para, Mangal has narrated that on that night itself mother was taken to hospital by Mandabai and Parubai and she was so taken at 10:00 p.m. The two ladies had returned home and she stayed back with the mother.

Apart from conflicting statements, the admission of Mangal indicates that the matter was reported to the police station on the same night and this report is not placed before the Court. The statement of Nirmala recorded in the morning of 1st September, 1998 by PHC Damase (Exhibit-24) is projected as the first information report and the first occasion when the deceased expressed her grievance. If the admission of Mangal is truthful, the prosecution owes an explanation for suppression of the first information report or statement that was recorded on the same night at 10:00 p.m. and if that report is not placed on record, the defence would be justified in claiming that the same must be exonerating report. This aspect is discussed by the learned Judge in para 40 of the Judgment, and in the light of Exhibit-24 supported by the depositions of PHC Damase and Dr. Joshi (PWs 6 and 9), feeling that the contemporaneous document (Exhibit-24) does not support the evidence of Mangal, the trial Judge observed "therefore, Mangal’s oral evidence on this point is required to be safely excluded from consideration". Although the Judge did not observe so in harsh words, the conclusion is that Mangal has narrated wrong/false story of having reported the story to the police on the same night. PHC Damase was emphatic that on the night of 31-8-1998 he was in the police station as PSO (police station officer) on duty and according to him, on that

night Nirmala with her daughter and two neighbouring ladies had not come to the police station to lodge complaint. He is certain that on that night he has not recorded statement of Nirmala. If that be so, the prosecution suffers dual disadvantage. It demonstrates that Mangal is capable of telling lies and it also demonstrates that immediately after the incident, Nirmala had not approached either the police station or the hospital. The exact distance between the police station and the hospital on one hand and the residence of Nirmala on the other has not come on record, but she is a resident of Narayangaon and the hospital as well as the police station are also at Narayangaon, which is not even a taluka place. It is a village in Taluka Junnar. It may not be unsafe to infer that all these distances may not be more than couple of kilometres.

Thus, it is evident that if admission of Mangal is taken into consideration, the prosecution ought to face the blame that it has suppressed the first information that was reported and it should fail because of adverse inference that possibly the suppressed report gave a different story. If admission of Mangal is wrong/false and PHC Damase is right in saying that none of them approached the police station on that night, the prosecution is obliged to explain the delay of nearly 10-12 hours in lodging FIR, although the police station,

hospital and residence of Nirmala are in the same small township. In either case, the prosecution suffers adverse inference. Mangal is the star witness, she is the victim so far as charge under Section 354 of IPC is concerned and an eye-witness so far as offence under Section 302 of IPC is concerned. We have already discussed in para 11 above as to how Mangal is capable of giving contradictory versions in her chief-examination and cross-examination, her claim that she is real daughter of the accused is a tall claim, not sustainable and in the light of the material on record the trial Court has admitted that her claim of reporting the matter to the police on the said night is false. She is not sure, if mother was taken to the hospital on the same night or next morning. She is uncertain whether mother was taken to local hospital or Sassoon Hospital and whether mother expired at the hospital or at the residence. We cannot avoid feeling that Mangal is unreliable witness.

We may point out one more point about her truthfulness. She has deposed that father poured kerosene upon her mother by removing the wick, article ‘1’ before the Court is that small lamp prepared of a bottle. On inspection, we find the wick very much present there in the hole created to the tin lid. If the wick was removed for the purpose of pouring kerosene

from the bottle, used as fuel tank of the lamp, the wick ought not to have been present in its proper position when article ‘1’ was attached.

We have discussed at length as to our doubts a;bout both the recorded dying declarations and we have also arrived at the conclusion that the second dying declaration Exhibit-22 is, in fact, in the hand-writing of PHC Damase. We are unable to appreciate this over-enthusiasm on the part of PHC Damase. Whether the FIR was registered on the same night or Exhibit-24 is the genuine FIR is also doubtful affair. In either case, the prosecution owes an explanation, may be for suppression, if not for delay. All these aspects weaken the reliability of the prosecution case. It has struck at the root of reliability of deposition of Mangal and reliability of the investigation as well.

13. The accused has not denied his presence. He has claimed to have suffered burn injuries while extinguishing the fire. Even when we refer to Exhibit-24, we find the contents lending support to such claim. Although it is claimed that Mangal, Parubai and Mandabai poured water and extinguished the fire, the said sentence on the back side page of Exhibit-24 is followed by "_____" Even in the dying declaration, Nirmala has not claimed

that the husband had suffered burn injuries in his attempt to set her on fire. Chronologically the description is given in part of the narration which is relating to details as to how fire was extinguished. On a reference to para 42 of the Judgment, the learned trial Judge has indulged into conjectures that it is highly probable of husband having sustained these burns while setting fire to Nirmala and not while extinguishing the fire. For the purpose the discussion is elaborated by saying that while pouring kerosene on Nirmala after removing the wick, some kerosene from the bottle might have spilled on the palm of the accused and while igniting Nirmala to fire, his palm also might have caught fire by burning match-stick. We are unable to concur with such conjecture. In fact, it is not the case of Nirmala that accused poured kerosene upon her by removing the wick of the bottle lamp. Such is the case propounded by Mangal and that is not supported either by Exhibit-22 or Exhibit-24.

14. For all the above reasons discussed, having felt that the prosecution evidence does not inspire confidence, we are inclined to record acquittal on the remaining two charges as well. Being inclined to record acquittal, alternate argument of the learned counsel that the offence is one under Section 304 Part-II is not required to be discussed.

15. The appeal is allowed. The Judgment, finding of guilty, conviction and sentence consequently imposed upon the appellant/accused by the Xth Additional Sessions Judge, Pune, at the conclusion of Sessions Case No.453 of 1998 vide Judgment dated 13-1-2000 is quashed and set aside. The appellant is acquitted of all the charges those were levelled against him.

He shall be set at liberty forthwith, if not required in any other case. Fine amount, if any deposited, shall be refunded.

(Smt. V.K.Tahilramani, J.) **(N.V.Dabholkar, J.)**